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No. 894

In the Supreme Court of the United States

OCTOBER TERM, 1955

HENRY KISSINGER, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

J. LEE RANKIN,
Solicitor General,

VICTOR E. HARDING,
Assistant Attorney General,
Department of Justice,
Washington 25, D. C.

NEIL BROOKS,
Assistant General Counsel,

DONALD A. CAMPBELL,
Attorney,
Department of Agriculture,
Washington 25, D. C.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit (Pet. 28-32) is reported in 250 F. 2d 940. The opinion of the United States District Court for the Middle District of Pennsylvania (Pet. 24-27) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on January 8, 1958. The petition for certiorari was filed on April 4, 1958. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1) and 2101(c).

QUESTIONS PRESENTED

1. Whether it was error to grant the government's motion for summary judgment without affording the petitioner an opportunity to introduce evidence which, the petitioner contends, would show that the enforcement of the Agricultural Adjustment Act of 1938 has failed to accomplish the congressional purpose and, therefore, that its continued enforcement is unreasonable and is in violation of the due process clause of the Fifth Amendment.

2. Whether the provisions of the First Amendment relating to the free exercise of religion afford a basis for exempting the petitioner from the civil penalty requirements of the Agricultural Adjustment Act of 1938.

STATUTE INVOLVED

The relevant provisions of the Agricultural Adjustment Act of 1938, as amended, are set forth in Appendix C to the petition (Pet. 33-36).

STATEMENT

This action was instituted to recover the civil penalty imposed by the Agricultural Adjustment Act of 1938 on petitioner's 1954 "farm marketing excess" of wheat. The petitioner admits that he planted and harvested wheat in 1954 in excess of the wheat acreage allotment established for his farm, that he has not stored or delivered to the Secretary of Agriculture any part of such excess, and that he has refused to pay the statutory penalties thereon, amounting to $47.04 (Pet. 37-43). The petitioner also admits that he did not apply for a downward adjustment of his farm marketing excess, or for an administrative review of the farm

marketing quota or farm marketing excess determined for the farm (Pet. 37-43).

The district court found that there was no genuine issue as to any material fact and granted the government's motion for summary judgment (Pet. 24-27). The court of appeals unanimously affirmed this judgment (Pet. 28-32).

ARGUMENT

1. The petitioner's contention that the enforcement of the Agricultural Adjustment Act of 1938 has failed to accomplish the purposes of the Act does not raise an issue of fact precluding grant of the government's motion for summary judgment. It is settled that questions relating to the "wisdom, need, and effectiveness of a particular [legislative] project" are "questions for the Congress, not the courts." *Oklahoma* v. *Atkinson Co.*, 313 U.S. 508, 527. See also, *Arizona* v. *California*, 283 U.S. 423, 456; *Everard's Breweries* v. *Day*, 265 U.S. 545, 559; *Chicago, B. & Q. R. R. Co.* v. *McGuire*, 219 U.S. 549, 569. This petition presents no basis for reviewing this well established principle.

2. The statutory provisions for setting wheat marketing quotas were reviewed, *in extenso*, in *Wickard* v. *Filburn*, 317 U.S. 111, 118-129, and upheld as a valid exercise of the power of Congress to regulate commerce. The Act does not prohibit the production of wheat; the civil penalties of "45 per centum of the parity price per bushel of wheat" relate solely to the farm marketing excess of wheat. 7 U.S.C. Supp. V, 1340(2). Petitioner may produce as much wheat as he chooses and he may market as much of his production as he chooses. The only limitation is a civil penalty on the farm marketing excess. 7 U.S.C. Supp. V, 1340(2). Moreover,

the civil penalty may be postponed or avoided by storing the farm marketing excess or delivering it to the Secretary. 7 U.S.C. Supp. V, 1340(3).[1]

Since no penalty is imposed for "planting wheat," there is no basis for petitioner's contention based on the First Amendment. In addition, freedom of religion does not, under the First Amendment, include freedom from the kind of regulation here involved. *Prince* v. *Massachusetts*, 321 U.S. 158, 163-171; *Davis* v. *Beason*, 133 U.S. 333, 342-345; *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879, 882-885 (C.A. 7), certiorari denied, 347 U.S. 1013. Clearly the First Amendment affords no basis for exempting the petitioner from the requirement that he pay a civil penalty on his farm marketing excess of wheat.

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[1] See also *United States* v. *Mumma*, 237 F. 2d 705 (C.A. 5), certiorari denied, 352 U.S. 1003, and *Miller* v. *United States*, 242 F. 2d 392 (C.A. 6), certiorari denied, 355 U.S. 833, in which attacks on the constitutionality of the civil penalty imposed by the Agricultural Adjustment Act for the production and marketing of wheat in excess of the farm marketing quota were rejected.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

J. LEE RANKIN,
Solicitor General.

VICTOR R. HANSEN,
Assistant Attorney General.

NEIL BROOKS,
Assistant General Counsel,

DONALD A. CAMPBELL,
Attorney,
Department of Agriculture.

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